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# Note

## ***Connecticut v. Mooney*: Can a Homeless Person Find Privacy Under a Bridge?**

### I. Introduction

"The great end, for which men entered into society, was to secure their property."<sup>1</sup> To achieve this purpose, the framers of the United States Constitution enacted the Fourth Amendment, which includes a search and seizure clause and a warrant clause:<sup>2</sup>

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>3</sup>

The Amendment reflects the clash between the individual's protection of person and property and the necessity of law enforcement for social control.<sup>4</sup> Under the Fourth Amendment, the police cannot conduct a warrantless search of an area in which an individual possesses a reasonable expectation of privacy.<sup>5</sup> The clearest example of such an "area" is a person's house or home.<sup>6</sup>

The ideals and principles encompassed by the Fourth Amendment are currently coming face to face with the era of

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1. Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (1765).

2. See, e.g., Katz v. United States, 389 U.S. 347, 365 (1967) (Black, J., dissenting), *infra* Part II.B.

3. U.S. CONST. amend. IV.

4. See Hudson v. Palmer, 468 U.S. 517, 525 (1983) (balancing Fourth Amendment protection of privacy rights against the concept of, and need for, incarceration).

5. See Katz, 389 U.S. 347, *infra* Part II.B.

6. See, e.g., Entick v. Carrington, 19 Howell's State Trials 1029 (1765), *infra* Part II.

homelessness. The homeless do not have a traditional "home".<sup>7</sup> Does the Fourth Amendment protect these non-traditional homes and the person's possessions within? For example, should homeless persons who build makeshift homes on government-owned land be afforded the expectation of privacy, and subsequent Fourth Amendment protection, normally associated with a "home?"<sup>8</sup> What if an individual creates a "home" within a natural cave located on federal lands and lives there for eight months?<sup>9</sup> Does the individual have a reasonable expectation of privacy in this cave against warrantless searches and seizures?<sup>10</sup>

The Connecticut Supreme Court in *Connecticut v. Mooney*<sup>11</sup> was confronted with the issue of the Fourth Amendment rights of a homeless defendant. In *Mooney*, a homeless man created a makeshift home under a secluded bridge abutment. The area under the bridge was organized into a living space and the defendant stored his belongings within a duffle bag and cardboard box.<sup>12</sup> The court faced the issue of whether the defendant had a reasonable expectation of privacy in his makeshift home, such that his belongings, stored within the duffle bag and cardboard box, were protected by the Fourth Amendment.

Part II of this Note describes the background of the Fourth Amendment, beginning with its origins in the English general warrant and the hated writs of assistance<sup>13</sup> of colonial America.<sup>14</sup> The Supreme Court decisions which are relied on by the court in *Mooney* and the resulting Fourth Amendment jurisprudence are

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7. See *infra* Part II.D.

8. See *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 12 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) (holding that homeless individuals who created makeshift homes on public land did not have a legitimate expectation of privacy in their homes), *infra* Part II.C.3.

9. See *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986) (defendant lived in a natural cave on federal land for eight months), *infra* Part II.C.3.

10. See *id.* at 1472-74. The Tenth Circuit conceded that the defendant had a subjective expectation of privacy, but decided that society was not prepared to recognize this expectation of privacy as reasonable. *Id.*

11. 588 A.2d 145, *cert. denied*, 112 S. Ct. 330 (1991).

12. *Id.* at 150. See *infra* Part III.A.

13. See *Stanford v. Texas*, 379 U.S. 476, 481 (1965) ("[t]he hated writs of assistance had given customs officials blanket authority to search . . .").

14. See generally POLYVIOS G. POLYVIU, *SEARCH AND SEIZURE: CONSTITUTIONAL AND COMMON LAW* 1-20 (1982) (discussing the origin of the Fourth Amendment).

outlined. Part II also describes the current scope of the homelessness crisis as it relates to the Fourth Amendment and to societal understandings of homelessness. Part III of this Note examines the unusual facts of *Mooney* and its majority and dissenting opinions. Part IV analyzes the reasoning of the majority and dissenting opinions and, in particular, their degree of reliance on the defendant's homelessness in assessing the defendant's expectation of privacy within his possessions. Part IV further explores the issue that the *Mooney* court declined to address: whether a homeless person possesses a reasonable expectation of privacy in an area considered "home." Part IV agrees with the determination in *Mooney* that a homeless person has a Fourth Amendment right in his possessions when such possessions are placed within closed containers and located in an area that he considers "home." Moreover, Part IV proposes that societal understandings of the privacy associated with a "home" afford an expectation of privacy to a homeless individual in the area the individual reasonably considers "home." Finally, Part V concludes that an expectation of privacy by the homeless in their "homes" may be considered reasonable if the area is clearly recognizable by a reasonable person as a home conveying an expectation of privacy, and should, therefore, be protected by the Fourth Amendment.

## II. Background

The spirit of the Fourth Amendment must be viewed from its origins. The Fourth Amendment is the only procedural safeguard in the Constitution which evolved directly from pre-revolutionary events in England.<sup>15</sup> In 17th century England, the power to search and seize was used by the Crown to restrict the freedom of the press.<sup>16</sup> The authority of the government to search for books and other publications was virtually unlimited.<sup>17</sup> General warrants were issued without specifying persons and places,<sup>18</sup> so that the "seizure of papers and effects was indis-

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15. WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 3 (2d ed. 1987) (discussing origin of the Fourth Amendment) [hereinafter LAFAYE].

16. POLYVIU, *supra* note 14, at 1.

17. LAFAYE, *supra* note 15, at 3.

18. POLYVIU, *supra* note 14, at 2.

criminate; everything was left to the discretion of the bearer of the warrant."<sup>19</sup>

The landmark English case of *Entick v. Carrington*<sup>20</sup> determined the validity of the search and seizure of papers under a general warrant.<sup>21</sup> *Entick* delineated the fundamental Fourth Amendment analysis of balancing public necessity with individual rights.<sup>22</sup> The right to privacy in one's home was passionately argued by William Pitt:<sup>23</sup> "The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter . . ."<sup>24</sup> The court found that any invasion of private property unsupported by statute, "be it ever so minute . . . and though the damage be nothing," was determined to be a trespass under the laws of England.<sup>25</sup>

Despite the English courts' determination that the right to privacy in an English home warranted protection, a similar right had yet to develop in pre-Constitutional America.<sup>26</sup> In America,

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19. *Id.*, quoting N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937). In the 1760's, the legality of general warrants of arrest was resolved. English courts determined that general warrants were contrary to the principles of common law and, therefore, illegal unless authorized by statute. *Id.* at 5-6.

20. 19 Howell's State Trials 1029 (1765). See also POLYVIU, *supra* note 14, at 6-8 (discussing *Entick v. Carrington*).

21. POLYVIU, *supra* note 14, at 6-7. John Entick had written an unlicensed book, "*The Monitor or British Freeholder*." The government considered this book seditious libel and issued a warrant for Entick's arrest and general warrant for his books and papers. The general warrant did not specify any particular papers and allowed the messengers to seize what they wished. *Id.*

22. Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1083 (1987) (concluding that the place or location where surveillance occurs, the nature and degree of intrusiveness of the surveillance, and the object of the surveillance are the implicit guidelines used by the Supreme Court in Fourth Amendment cases).

23. William Pitt (1708-78) was a member of Parliament and, for a short time, prime minister of England. 15 THE WORLD BOOK ENCYCLOPEDIA 453, 454 (1986). He protested against British policy in the American colonies and defended the rights of the colonists. *Id.* at 454.

24. LAFAYE, *supra* note 15, at 4 (quoting NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 49-50 (1937)).

25. *Entick*, 19 Howell's State Trials at 1066 (Comments of Camden, L.J.).

26. POLYVIU, *supra* note 14, at 10.

writs of assistance were widely used by customs officers to search buildings for smuggled goods.<sup>27</sup> The writs were general standing warrants which were even more sweeping in scope than the English general warrant.<sup>28</sup> Unlike the general warrant, the writ of assistance did not expire upon execution, but continued in force until the death of the reigning sovereign.<sup>29</sup> The massive oppression inflicted with these writs caused the colonists to challenge them in court after the death of King George II in 1760.<sup>30</sup> Although the court decided against the colonists, the seeds of secession and independence were sown.<sup>31</sup> From these seeds grew the Declaration of Independence and the Constitution of the United States.

#### A. *The Early American Cases*

An early case interpreting and defining the scope of the Fourth Amendment was *Boyd v. United States*.<sup>32</sup> The majority in *Boyd* determined that a forcible entry upon premises or an actual search for papers need not occur before the Fourth Amendment was implicated.<sup>33</sup> Relying on the reasoning in *Entick v. Carrington*,<sup>34</sup> the majority observed that:

[t]he principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case [that is] before the court . . . they apply

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27. *Id.*

28. *Id.*

29. *Id.* The writs were not specifically meant for one case. ANNE HUSTED BURLEIGH, JOHN ADAMS 50 (1969) (describing the pre-revolutionary events in colonial America) (citation omitted). Once the writ was issued, the holder could search any house that he suspected contained smuggled goods without further permission from a court. *Id.*

30. POLYVIU, *supra* note 14, at 10-11.

31. *Id.* According to John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely in 1776, he grew to manhood, and declared himself free." *Id.* at 11 (quoting 10 WORKS OF JOHN ADAMS 247-48 (1856)).

32. 116 U.S. 616 (1886) (importer complied under protest with an order to produce documents containing proof of guilt under customs revenue statute). Prior to *Boyd*, *Ex parte Jackson*, 96 U.S. 727 (1877), held that letters and packages in the mail could not be opened without a search warrant. *Id.* at 733. *Ex parte Jackson* was reaffirmed in *United States v. VanLeeuwen*, 397 U.S. 249 (1970). See generally POLYVIU, *supra* note 14, at 14 (discussing the origins and interpretation of the Fourth Amendment).

33. *Boyd*, 116 U.S. at 630.

34. 19 Howell's State Trials 1029 (1765).

to all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life.<sup>35</sup>

Thus, the Court declared that a substantive right to personal freedom and security was expressed in the Fourth Amendment.<sup>36</sup> The majority warned that this guarantee from unreasonable search and seizure must be "liberally construed" to accomplish the full protection of the amendment.<sup>37</sup>

Unfortunately, a "liberal" spirit<sup>38</sup> has not always been used to construe the Fourth Amendment. For example, in *Olmstead v. United States*,<sup>39</sup> the Court held that telephone wiretapping, unforeseen by the framers of the Fourth Amendment, was not a search or seizure.<sup>40</sup> Ignoring *Boyd's* mandate to construe the Fourth Amendment liberally,<sup>41</sup> the Court interpreted the Amendment's purpose restrictively.<sup>42</sup> The Court relied primarily on the specific historical origins of the Amendment, namely, concern over the use of governmental force to search houses and effects.<sup>43</sup> "Reasonableness" was construed in "light of what was deemed an unreasonable search and seizure when [the Amendment] was adopted . . . ."<sup>44</sup> The Court reasoned that the Amendment was only violated by a seizure of "tangible material effects"<sup>45</sup> and would operate only after an "actual physical invasion of the [defendant's] house or 'curtilage'<sup>46</sup> for the pur-

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35. *Boyd*, 116 U.S. at 630.

36. POLYVIU, *supra* note 14, at 15.

37. *Boyd*, 116 U.S. at 635. The Court warned:

[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from the legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

*Id.*

38. *See id.*

39. 277 U.S. 438 (1928) (government agents tapped defendant's telephone to obtain incriminating evidence).

40. *Id.* at 464-65. The Court stated that, "[t]he [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure . . . . There was no entry of the houses or offices of the defendants." *Id.* at 464.

41. *Boyd*, 116 U.S. at 635.

42. *Olmstead*, 277 U.S. at 465.

43. *Id.* at 465-66.

44. *Id.* at 465 (quoting *Carroll v. United States*, 276 U.S. 132, 149 (1925)).

45. *Id.* at 466.

46. At common law, the curtilage was the area to which the intimate activity associ-

pose of making a seizure."<sup>47</sup> In other words, a trespass was necessary.<sup>48</sup>

*Olmstead* was highly criticized for relying on the law of trespass.<sup>49</sup> Yet, subsequent Fourth Amendment cases developed a two part inquiry relying on the law of trespass: "[ (1) ] Did the governmental intrusion occur within a constitutionally protected place? [and (2) ] If so, was the intrusion accompanied by a constitutionally objectionable physical invasion?"<sup>50</sup> The "constitutionally protected areas" doctrine allowed Fourth Amendment protection for an individual who was in a place accepted by society as an area where privacy should be enjoyed, such as the home.<sup>51</sup> As can be seen from the cases, areas not normally associated with privacy were not protected. For example, in *Hester v. United States*,<sup>52</sup> the Court excepted open fields<sup>53</sup> from Fourth Amendment inquiry because open fields were not areas normally considered private and did not deserve the "special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects.'"<sup>54</sup> Since open fields did not meet the "constitutionally protected place" test, the police could search without implicating the Amendment's protection.<sup>55</sup>

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ated with the "sanctity of a man's home and the privacies of life" extended and, therefore, was considered part of the home itself. *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting, in part, *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

47. *Olmstead*, 277 U.S. at 466.

48. POLYVIU, *supra* note 14, at 24-25.

49. POLYVIU, *supra* note 14, at 25. Justice Brandeis dissented in *Olmstead*, referring to the expansive language of *Boyd* and the purpose of the Fourth Amendment. *Olmstead*, 277 U.S. at 471, 478 (Brandeis, J., dissenting). Noting the 775 typewritten pages of notes of the overheard conversations, he emphasized that the framers "conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men." *Id.* Although wiretapping was unforeseen by the framers, a "principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of Constitutions . . ." *Id.* at 473.

50. Wilkins, *supra* note 22, at 1085.

51. POLYVIU, *supra* note 14, at 25.

52. 265 U.S. 57 (1924). In *Hester*, the defendant abandoned a jug of "distilled spirits" while being pursued by "revenue agents." *Id.* at 58. The jug was abandoned on his father's land and the agents picked it up as evidence without a warrant. *Id.*

53. It should be noted that the term "open fields" is not used as in common speech. Thus, an open field does not have to be "open" or a "field." It may include any unoccupied or undeveloped area outside of the curtilage. *Oliver v. United States*, 466 U.S. 170, 180 n.11 (1984), *infra* Part II.C.2.

54. *Hester*, 265 U.S. at 58-59.

55. *Id.* at 59. The Court also noted that "the distinction between the [open fields]

## B. *A Revolving Standard - Katz v. United States*

Due to new technology and changing societal customs, the "constitutionally protected area" standard became unworkable.<sup>56</sup> A new standard was articulated in *Katz v. United States*.<sup>57</sup> The Supreme Court ruled that the formulation of Fourth Amendment issues in terms of "constitutionally protected areas" was incorrect because it did not reflect the true spirit of the Amendment.<sup>58</sup> The Court held that the Fourth Amendment protects people, not places:<sup>59</sup>

[T]he trespass doctrine [enunciated in *Olmstead*] can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.<sup>60</sup>

Justice Harlan's concurrence clarified the new formula by stating that "there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"<sup>61</sup>

and the house is as old as the common law." *Id.*

56. For example, in *Goldman v. United States*, 316 U.S. 129 (1942), the Court held that a Fourth Amendment search did not occur when the government placed a "detectaphone" against an outer wall to listen to conversations inside. *Id.* at 135. But in two other electronic eavesdropping cases between 1942 and 1964, however, the Court held that a Fourth Amendment search had occurred. See *Silverman v. United States*, 365 U.S. 505 (1961) (eavesdropping with a "spike mike" inserted into a wall was a violation of Fourth Amendment rights); *Clinton v. Virginia*, 377 U.S. 158 (1964) (listening device inserted into a wall was a violation of Fourth Amendment rights).

57. 389 U.S. 347 (1967). The defendant was in a telephone booth transmitting waging information when the F.B.I. attached an electronic listening device and recorded his conversation. *Id.* at 348. The Court held that the defendant's Fourth Amendment right against unreasonable searches and seizures had been violated. *Id.* at 353.

58. *Id.* What the defendant "sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear." *Id.* at 352.

59. *Id.* at 353.

60. *Id.*

61. *Id.* at 361 (Harlan, J., concurring). Justice Harlan later expressed reservation about the subjective prong, stating that analysis under *Katz* "must . . . transcend the search for subjective expectations. . . . [W]e should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society." *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). In *Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984), the majority reflected upon, and agreed with,

C. *Post-Katz Cases - Applying the "Liberal" Spirit More Restrictively*

The Supreme Court continued to apply the *Katz* reasonable expectation of privacy standard, but began to limit the reach of the standard. The application of the *Katz* standard to the Fourth Amendment doctrines concerning closed containers and open fields was discussed in *Connecticut v. Mooney*.<sup>62</sup>

1. *Closed Containers Protection*

Traditionally, closed containers were afforded Fourth Amendment protection.<sup>63</sup> In *United States v. Jacobsen*,<sup>64</sup> the Court held that "warrantless searches of effects are presumptively unreasonable"<sup>65</sup> because "[a] container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant."<sup>66</sup> Closed containers, such

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"[t]he Court's refusal to adopt a test of 'subjective expectation'. . . ." See generally Wayne R. LaFave, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061, 1080 (1987) (stating that the subjective requirement deserves no place in a theory of what the Fourth Amendment protects).

62. 588 A.2d 145, cert. denied, 112 S. Ct. 330 (1991). See *infra* Part III.B.2.

63. See, e.g., *United States v. VanLeeuwen*, 397 U.S. 249 (1970) (packages of coins in the mail); *Ex parte Jackson*, 96 U.S. 727 (1878) (letters in the mail). See also *supra* note 32.

64. 466 U.S. 109 (1984) (cocaine found in damaged Federal Express package).

65. *Id.* at 114.

66. *Id.* at 120 n.17. The warrant requirement does not apply to closed containers found within automobiles, if probable cause supports a search of the container. In *California v. Acevedo*, 111 S. Ct. 1982 (1991), the Court adopted a "clear-cut rule" governing automobile searches and eliminated the need for a warrant. *Id.* at 1991. This holding represented a narrowing of Fourth Amendment protection for closed containers. Traditionally, "one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (search of a locked footlocker taken from trunk of an automobile)). Regardless of the diminished expectation of privacy in an automobile, the Court had previously allowed Fourth Amendment protection for closed containers found during the search of an automobile. See *Chadwick*, 433 U.S. at 15-16; *Arkansas v. Sanders*, 442 U.S. 753, 763 (1979) (holding unconstitutional the search of a locked suitcase taken from a taxicab's trunk). However, other cases had held that searches of some integral part of the automobile, such as a concealed compartment under the dashboard or behind the upholstery of the seats, was permissible. See *Chambers v. Maroney*, 399 U.S. 42 (1970) (guns concealed in compartment under dashboard); *Carroll v. United States*, 267 U.S. 132 (1925) (bottles of contraband liquor hidden behind seats). These latter cases were later "clarified" in *United States v. Ross*, 456 U.S. 798 (1982) (search of brown paper bag

as luggage, are a common repository for one's personal effects.<sup>67</sup> Therefore, they are associated with an expectation of privacy.<sup>68</sup> The type of container has no bearing on the protection it receives because "once placed within a [closed] container, a diary and a dishpan are equally protected by the Fourth Amendment. . . . [N]o court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffel bag, or box."<sup>69</sup>

In *California v. Greenwood*,<sup>70</sup> the Court lessened the emphasis on the subjective expectation prong of *Katz* in a closed container.<sup>71</sup> In *Greenwood*, the defendant placed his garbage out for collection and the police searched it after the refuse collector picked up the garbage.<sup>72</sup> Although the defendant had a subjective expectation of privacy in the contents of his garbage left in

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located in trunk of car). In *Ross*, the Court held that a "probing search of compartments and containers" within an automobile was reasonable if supported by probable cause. *Id.* at 800 (emphasis added). The Court found that a belief that a vehicle was transporting contraband was sufficient for probable cause. *Id.* at 823. Thus, the Court determined in *Acevedo* that "the time had come" to end the distinction between a container in an automobile that the police are specifically searching for and one that they happen to come across while searching the vehicle. *Acevedo*, 111 S. Ct. at 1991. Moreover, the Court found that the *Chadwick* rule had "devolved into . . . an anomaly such that the more likely the police [were] to discover drugs in a container, the less authority they [had] to search it." *Id.* at 1990.

67. See *Arkansas v. Sanders*, 442 U.S. 752, 764 n.13 (1979) (search of unlocked suitcase taken from trunk of taxicab).

68. See *id.* at 762.

69. *Robbins v. California*, 453 U.S. 420, 426-27 (1981) (finding that there was a reasonable expectation of privacy in search of packages wrapped with green opaque plastic found within a closed compartment of an automobile). The Court noted an exception to the closed container rule if the contents of the containers could be inferred from their outward appearance; that is, if the containers were transparent or otherwise clearly revealed their contents. *Id.* at 427.

70. 486 U.S. 35 (1988) (search of garbage bags after they were picked up by the refuse collector).

71. *Id.* at 39. *Katz* expressed a two-prong test: (1) the defendant must exhibit a subjective expectation of privacy; (2) society must be prepared to recognize such an expectation as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring), *supra* note 57. However, in *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court noted that its "refusal to adopt a test of 'subjective expectation' is understandable; constitutional rights are generally not defined by the subjective intent of those asserting the rights." *Id.* at 525 n.7. See also Madeline A. Herdrich, Note, *California v. Greenwood: The Trashing of Privacy*, 38 Am. U. L. Rev. 993, 995 (1989) (criticizing the majority for failing to address social norms and local law in its evaluation of the defendant's privacy interest).

72. *Greenwood*, 486 U.S. at 37-38.

his driveway for collection, the Court held that society was not prepared to recognize such an expectation as reasonable.<sup>73</sup> Relying on the statement made in *Katz* that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,"<sup>74</sup> the Court determined that the garbage was readily accessible to the public.<sup>75</sup> As such, garbage placed outside of the curtilage<sup>76</sup> of one's home was not afforded the usual "closed container" Fourth Amendment protection.<sup>77</sup>

## 2. The Open Fields Doctrine

In *Oliver v. United States*,<sup>78</sup> the Court announced that the open fields<sup>79</sup> doctrine established in *Hester v. United States*<sup>80</sup> had not vanished after *Katz* reformulated Fourth Amendment inquiry and removed the emphasis on a physical trespass.<sup>81</sup> The Court declined a case-by-case analysis of Fourth Amendment protection in open fields<sup>82</sup> and established a bright-line rule: in-

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73. *Id.* at 39-40. The Court determined that the garbage was outside the curtilage of the defendant's home, and thus did not fall under the Fourth Amendment protection of "houses." *Id.*

74. *Id.* at 41.

75. *Id.* at 40 (quoting *Katz*, 389 U.S. at 351). Not only was the garbage "readily accessible to animals, children, scavengers, snoops, and other members of the public," *id.* at 40, but the defendant had placed it there for the "express purpose of having strangers take it." *Id.* at 41 (quoting *U.S. v. Reichert*, 647 F.2d 397, 399 (3d Cir. 1981)). Interestingly, the Court notes in a footnote, "[i]t is not only the homeless of the Nation's cities who make use of other's refuse . . ." *Id.* at 40 n.3. The Court appears to assume that searching through garbage by the homeless is a well-known social phenomenon.

76. *See supra* note 46.

77. *Greenwood*, 486 U.S. at 41. The Court's holding ignores the view that garbage is a repository of personal effects, as closed containers are traditionally regarded. *Id.* at 50 (Brennan, J., dissenting).

78. 466 U.S. 170 (1984) (search of a field where marijuana was growing).

79. *See supra* note 53.

80. 265 U.S. 57 (1924). *See supra* note 52 and accompanying text.

81. *Oliver*, 466 U.S. at 184. The Court in *Oliver* determined that the reasonable expectation of privacy standard under *Katz* "did not sever Fourth Amendment doctrine from the Amendment's language." *Id.* at 176 n.6. Thus, under the *Katz* standard, open fields remained as unprotected by the Fourth Amendment as they had under the earlier "constitutionally protected place" standard.

82. *Id.* at 181. The Court stated:

[n]or would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment . . . . The ad-hoc approach not only makes it difficult for the policeman to

dividuals cannot legitimately demand privacy in open fields, except in the area immediately surrounding their homes (the curtilage).<sup>83</sup> Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference.<sup>84</sup> Clarifying the *Katz* test, the Court stated that "[t]he test of legitimacy<sup>85</sup> is not whether the individual chooses to conceal assertedly 'private' activity.<sup>86</sup> Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."<sup>87</sup> Therefore, society does not regard an expectation of privacy in an open field as reasonable because of the non-private nature of open fields.<sup>88</sup>

Closely related to the open fields doctrine is the abandonment issue. Abandonment occurs when closed containers have been left by their owners in open fields or areas accessible to the public.<sup>89</sup> In *United States v. Brown*,<sup>90</sup> the Fifth Circuit held that

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discern the scope of his authority . . . it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced.

*Id.* at 181-82.

83. *Id.* at 178.

84. *Id.* at 179. However, the Fourth Amendment does protect activities in open fields which may implicate an individual's privacy; an individual does not lose all claims to privacy when he/she enters a "public" place. *Id.* at 179 n.10.

85. *Id.* at 182. The Court has used the terms "legitimate" and "reasonable" interchangeably despite the different connotations. See Michael Campbell, Comment, *Defining A Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 216 (1986) (asserting that use of "legitimate" is based on the faulty notion that the Fourth Amendment only protects the innocent and desiring a standard defined by "government conduct which violates a social norm of privacy.").

86. *Oliver*, 466 U.S. at 182. Steps taken by an individual to protect privacy in open fields do not make an expectation of privacy reasonable. *Id.* In *Oliver*, the defendant attempted to conceal the marijuana by fencing it in with chicken wire and erecting "No Trespassing" signs. *Id.* at 170.

87. *Id.* at 182.

88. *Id.* See *California v. Ciraolo*, 476 U.S. 207 (1986); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). In both of these cases, decided on the same day, the Court reaffirmed warrantless searches of open fields. In *Ciraolo*, the Court held a naked-eye aerial observation of a backyard constitutional, even though the backyard was considered part of the curtilage. *Ciraolo*, 476 U.S. at 215. In *Dow*, an aerial observation and photography of a 2,000 acre chemical plant complex was held constitutional because it was an open-field, not a curtilage. *Dow*, 476 U.S. at 228.

89. *Connecticut v. Mooney*, 588 A.2d 145, 158-59, cert. denied, 112 S. Ct. 330 (1991).

90. 473 F.2d 952 (5th Cir. 1973) (police seized suitcase buried under chicken coop on abandoned farm).

a suitcase buried in an open field was "abandoned."<sup>91</sup> The court emphasized that the issue was not "abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy [in that item]."<sup>92</sup>

In *United States v. Thomas*,<sup>93</sup> the D.C. Circuit also interpreted abandonment. In *Thomas*, the defendant dropped a gym bag in the hallway of an apartment building because he knew the police were approaching.<sup>94</sup> The court held that the gym bag was abandoned, even though the defendant intended to return for it later.<sup>95</sup> To determine abandonment under the Fourth Amendment, the court focused on the manifested intent of the person alleged to have abandoned the object.<sup>96</sup> Intent can be inferred from "words spoken, acts done, and other objective facts."<sup>97</sup> The court also noted that the "mere act" of placing a bag on the ground does not constitute abandonment; "[t]he law obviously does not insist that a person assertively clutch an object in order to retain the protection of the Fourth Amendment."<sup>98</sup>

The continued viability of the abandonment doctrine has

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91. *Id.* at 954.

92. *Id.* at 954 n.5 (quoting *United States v. Colbert & Reese*, 474 F.2d 174, 176 (5th Cir. 1973)).

93. 864 F.2d 843 (D.C. Cir. 1989) (gym bag dropped in hallway of apartment building as police approached).

94. *Id.* at 846-47.

95. *Id.* The court stated that:

[t]he legal significance of Thomas' acts [was] not altered by the fact that he might have intended to retrieve the bag later. His ability to do so would depend on the fortuity that other persons with access to the public hallway would not disturb his bag while it lay there unattended.

*Id.* at 846 n.5.

96. *Id.* at 846.

97. *Id.* (quoting *United States v. Colbert & Reese*, 474 F.2d 174, 176 (5th Cir. 1973)). See also *St. Paul v. Vaughn*, 237 N.W.2d 365 (Minn. 1975) (eyeglass case hidden under counter at dry cleaners while police were in pursuit deemed abandoned for Fourth Amendment purposes). In *St. Paul*, the court stated that "all relevant circumstances existing at the time of the alleged abandonment should be considered . . ." *Id.* at 370 (quoting *United States v. Colbert & Reese*, 474 F.2d 174, 176 (5th Cir. 1973)).

98. *Thomas*, 864 F.2d at 846.

been questioned recently by the Seventh Circuit.<sup>99</sup> Relying on the *California v. Greenwood*<sup>100</sup> opinion, the court concluded that the Supreme Court "chose not to rely on principles of abandonment in its Fourth Amendment analysis, despite the reliance on that principle by most of the circuit courts . . . . As a result, the continued viability of [the] abandonment approach is questionable."<sup>101</sup>

### 3. *Balancing Interests Under The Fourth Amendment*

Determining the reasonableness of an expectation of privacy where there are no "bright line" rules entails a balancing of interests.<sup>102</sup> Two cases concerning warrantless searches of make-shift homes constructed by homeless defendants were decided against the defendants under a balancing of interests approach.<sup>103</sup> In both situations, the courts determined that the defendants' status as trespassers outweighed their privacy interests in their "homes."<sup>104</sup> In *Amezquita v. Hernandez-Colon*,<sup>105</sup> homeless squatters built "structures"<sup>106</sup> on land owned by the Commonwealth of Puerto Rico and defied orders to leave.<sup>107</sup> The First Circuit held that the defendants did not have a legitimate

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99. See *United States v. Hendrick*, 922 F.2d 396 (7th Cir. 1991) (search of opaque garbage bags inside closed garbage cans).

100. 486 U.S. 35 (1988). See *supra* note 70 and accompanying text.

101. *Hendrick*, 922 F.2d at 398.

102. See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984) (unannounced "shakedown" search of defendant's cell). The Court balanced the "interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell." *Id.* at 527. The Court concluded that the "right of privacy in traditional Fourth Amendment terms is fundamentally incompatible" with imprisonment because "society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security." *Id.* Thus, the prisoner's expectation of privacy in a prison cell against unreasonable searches was not a "reasonable" one in the eyes of society. *Id.* at 535.

103. See *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976); *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986).

104. *Amezquita*, 518 F.2d at 12; *Ruckman*, 806 F.2d at 1475.

105. 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976).

106. These structures were described by the trial court as "houses, shacks, and sundry structures" built on farmland owned by the Commonwealth of Puerto Rico. *Amezquita v. Colon*, 378 F. Supp. 737, 740 (D.P.R. 1974). The homeless squatters called the community "Villa Pangola" or "Villa Ibanez." *Id.*

107. *Amezquita*, 518 F.2d at 9.

expectation of privacy in their makeshift homes.<sup>108</sup> In determining what constituted a "home" for Fourth Amendment purposes, the court focused on the public location and the illegal means by which it was acquired.<sup>109</sup>

In *United States v. Ruckman*,<sup>110</sup> the defendant had lived in a cave on federal lands for eight months.<sup>111</sup> The police conducted a warrantless search of the cave and seized illegal firearms.<sup>112</sup> After the defendant was arrested, the police again searched without a warrant and found anti-personnel booby traps.<sup>113</sup> The Tenth Circuit conceded that the defendant had a subjective expectation of privacy, indicated in part by his attempt to "enclose" the cave with a crude "door."<sup>114</sup> However, the court stated that the real issue was "whether the cave comes within the ambit of the Fourth Amendment's prohibition of unreasonable searches of 'houses.'"<sup>115</sup> The court determined that society was not prepared to recognize the defendant's expectation of privacy as reasonable because a cave is not a "house" and the defendant was trespassing on public land.<sup>116</sup>

#### D. Homelessness

Homelessness in America is not a new problem, but the size and scope of the problem are.<sup>117</sup> Since colonial times, there have been homeless persons in America.<sup>118</sup> Today, the homeless are not hidden or out of sight and they know no geographical

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108. *Id.* at 12.

109. *Id.*

110. 806 F.2d 1471 (10th Cir. 1986).

111. *Id.* at 1471-72.

112. *Id.*

113. *Id.* at 1472.

114. *Id.*

115. *Id.*

116. *Id.* at 1475.

117. See Lauren M. Malatesta, Comment, *Finding a Right to Shelter for Homeless Families*, 22 SUFFOLK U. L. REV. 719, 720, 746 (1988) (examining the development of a right to shelter at the state level and concluding that "[c]ourts are necessary to establish the rights of homeless families, whether the right to shelter is found in a constitutional provision or in a statute.").

118. GREGG BARAK, *GIMME SHELTER: A SOCIAL HISTORY OF HOMELESSNESS IN CONTEMPORARY AMERICA* 6 (1992). The author distinguishes among the homeless of colonial times, those of the industrial period, and those of today. *Id.* at 6.

boundaries.<sup>119</sup> Estimates of the size of the homeless population vary from 250,000 to over three million.<sup>120</sup> The homeless population consists of "men, women, and children of all racial and ethnic backgrounds; the urban and rural working and non-working poor; displaced and deinstitutionalized persons; alcoholics, drug addicts, mentally ill, and those afflicted with AIDS; physically abused mothers and their babies, throwaways and runaways, sexually abused adolescents, . . . migrants, refugees, and Vietnam veterans."<sup>121</sup> Societal causes of homelessness include unemployment, shortage of low-cost housing, depopulation of state mental hospitals,<sup>122</sup> and inadequate public assistance programs.<sup>123</sup> According to one commentator, "[t]he immediate event which precipitates homelessness may be any of several kinds, ranging from the seemingly trivial to the manifestly disastrous. In almost every case, however, exile to the streets was accompanied by a sense of having been pushed to one's limit and having nowhere else to turn."<sup>124</sup> By the end of the century, the homeless population could reach 19 million persons.<sup>125</sup>

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119. *Id.* at 33.

120. MARY ELLEN HOMBS, *AMERICAN HOMELESSNESS: A REFERENCE HANDBOOK* 6 (1990). These figures represent only the literal homeless. There are more than 15 million persons who are not literally homeless, but who are "housing poor;" that is, persons who live in substandard housing. See Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315, 315-17 (1990-91) (viewing decent and affordable housing as a right of all Americans which must be recognized through legislation).

121. BARAK, *supra* note 118, at 4.

122. ELLEN BAXTER & KIM HOPPER, *PRIVATE LIVES/PUBLIC SPACES: HOMELESS ADULTS ON THE STREETS OF NEW YORK CITY* 30 (1981) (study of the homeless in New York City).

123. James K. Langdon II & Mark A. Kass, *Homeless in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 311 (1985) (examining the homeless problem and concluding that only comprehensive federal legislation can provide the needed short-term shelter and long-term solution).

124. BAXTER & HOPPER, *supra* note 122, at 34. The poor, who are most vulnerable to homelessness, are those who have pre-existing medical, psychiatric, social or vocational problems. These persons are the most likely to be "pushed out" of the bottom of the housing market and have the most trouble jumping back in. See Lucie White, *Representing "The Real Deal,"* 45 U. MIAMI L. REV. 271, 278 (1990-91) (discussing advocacy against homelessness and the images which have arisen from and infected the concept of "homelessness"). Even if the homeless desire shelter, their requests are often unmet. The U.S. Conference of Mayors found that 15 percent of requests for shelter nationwide went unmet in 1991. Press Conference with U.S. Mayors in Washington, D.C. (Dec. 16, 1991) (reprinted by Federal News Service).

125. BAXTER & HOPPER, *supra* note 122, at 34.

The Stewart B. McKinney Homeless Assistance Act,<sup>126</sup> passed in 1987, formally recognized the problem of homelessness and attempted to establish a national uniform policy.<sup>127</sup> The purpose of the Act is to meet the critically urgent needs of the nation's homeless.<sup>128</sup> Title I establishes the general definition of a homeless person within the scope of the statute: "A person who: 1. lacks a fixed, regular, and adequate nighttime residence, or 2. lives in a shelter, an institution other than a prison, or a place not designed for or ordinarily used as a sleeping accommodation for human beings."<sup>129</sup> A more descriptive definition of the homeless is "those whose primary nighttime . . . residence is either in the publicly or privately operated shelters or in the streets, in doorways, train stations and bus terminals, public plazas and parks, subways, abandoned buildings, loading docks and other well-hidden sites known only to their users."<sup>130</sup>

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126. Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified at 42 U.S.C.A. § 11302(a) (West Supp. 1992)) (authorizing funds to protect the lives and dignity of the homeless through various assistance programs and establishing the Interagency Council on the Homeless).

127. *Id.* The Act states in its findings that:

- (1) the Nation faces an immediate and unprecedented crisis due to the lack of shelter for a growing number of individuals and families, including elderly persons, handicapped persons, families with children, Native Americans, and veterans;
- (2) the problem of homelessness has become more severe and, in the absence of more effective efforts, is expected to become dramatically worse, endangering the lives and safety of the homeless;
- (3) the causes of homelessness are many and complex, and homeless individuals have diverse needs;
- (4) there is no single, simple solution to the problem of homelessness because of the different subpopulations of the homeless, the different causes of and reasons for homelessness, and the different needs of homeless individuals;
- (5) due to the record increase in homelessness, States, units of local government, and private voluntary organizations have been unable to meet the basic human needs of all the homeless and, in the absence of greater Federal assistance, will be unable to protect the lives and safety of all the homeless in need of assistance; and
- (6) the Federal Government has a clear responsibility and an existing capacity to fulfill a more effective and responsible role to meet the basic human needs and to engender respect for the human dignity of the homeless.

42 U.S.C.A. § 11301(a).

128. 42 U.S.C.A. § 11301(b).

129. 42 U.S.C. §§ 11302-03.

130. BAXTER & HOPPER, *supra* note 122, at 6-7. Neither this definition nor the definition in the Stewart B. McKinney Homeless Assistance Act considers the "hidden or invisible homeless, the prehomeless people, the renters and even the homeowners at risk, or people who are without a fixed domicile." See BARAK, *supra* note 118, at 27-28.

The homeless have two basic problems: a lack of a place to live; and poverty. The lack of a "home" is devastating; as one commentator described it:

On a basic, concrete level, a home offers its inhabitants the ability to sleep comfortably, to eliminate bodily wastes, to bathe, to rest, to recuperate from illness, to store, prepare, and consume food, to store belongings (such as clothes, documents, books, and other items having personal or sentimental value), to entertain oneself and one's friends, and to communicate conveniently (by mail and by phone) with others outside the home. For many people, a home also represents an opportunity to enjoy security (physical and psychological), personal privacy, and family intimacy (including sexual expression and the care of children), and to express individuality. In sum, a permanent home allows us to exercise autonomy.<sup>131</sup>

Although the homeless lack a "traditional home," they often have a "home base." This home base is "one geographical locale, where one performs the usual functions of sleeping, eating and living in accordance with one's lifestyle, and a place to which one, 'wherever temporarily located' always intends to return."<sup>132</sup>

The homeless are bound together by a number of factors, such as concerns over the weather, the search for nourishment, and an "ever-present fear for personal security."<sup>133</sup> They struggle to fight off "indecencies, indignities, and obscenities" in daily existence.<sup>134</sup> They often create "communities" where they feel more secure.<sup>135</sup> These communities exemplify that "homeless-

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131. Wes Daniels, *Symposium on Law and the Homeless: An Introduction*, 45 U. MIAMI L. REV. 261, 265 (1990-91).

132. *Pitts v. Black*, 608 F. Supp. 696, 698 (S.D.N.Y. 1984) (homeless plaintiff describing his view of "residence" or "home base").

133. Kevin P. Sherburne, Comment, *The Judiciary and the Ad Hoc Development of a Legal Right to Shelter*, 12 HARV. J.L. & PUB. POL'Y 198 (1989) (concluding that litigation aimed at establishing a federal right to shelter will fail because the scope of the judiciary's power does not include the ability to create a right to shelter).

134. BARAK, *supra* note 118, at 7.

135. See, e.g., Jennifer Toth, *N.Y.'s 'Mole People' Shun Society in Transit Tunnels; Homeless: They've Set Up Small Havens — And Even Communities — In a Netherworld of Dank Rail Passages*, L.A. TIMES, Sept. 2, 1990 at 1 (describing the communities of homeless who live together in the subway tunnels); Thomas Morgan, *A Shantytown Society Grows in the Shadow of Skyscrapers*, N.Y. TIMES, Oct. 20, 1991 at 1 (describing homeless encampments where the homeless choose to live because shelters are too dangerous).

ness is not a trait, or an impairment, or even a social deficit. It is rather a circumstance, arising from a variety of causes, that presents a problem to be solved: 'where to stay that night?'"<sup>136</sup>

An alternative to the streets is local shelters. Local shelters, however, are intended for short-term use only.<sup>137</sup> Indeed, the conditions are often deplorable at best.<sup>138</sup> In many shelters, the homeless are checked for drugs and weapons.<sup>139</sup> They shower and sleep side-by-side with people they neither choose nor trust.<sup>140</sup> For example, one description of a public shelter by a study on the homeless reads:

Beds are arranged in four long rows, each stretching the length of the room. Each bed is separated from the adjacent one by a metal locker. Many of the doors to the lockers . . . were sprung, making the key paying customers receive at the desk useless . . . . The mattresses are, without exception, black with dirt and grime, pockmarked with the burns of innumerable cigarettes, and torn so that the stuffing protrudes . . . . It was too dark to see whether the bedding was louse-infested.<sup>141</sup>

In fact, shelters are often avoided by the homeless except in the harshest of weather.<sup>142</sup> According to one observer, "that's why people sleep under bridges, to get [their] privacy back."<sup>143</sup>

136. BARAK, *supra* note 118, at 29-30. The homeless are often viewed as products of their own individual faults or actions. In periods of housing crisis, these "victim focused" policies "shift the blame for unfair housing allocation from market failure to personal fault." White, *supra* note 124, at 298-99. "We wonder about [the homeless person's] symptoms, his history, why he can't hold down a job, why he would never 'make it.'" *Id.* Although "it is all too common to search for the causes of this growing problem in such personal problems as divorce, desertion and 'personal misfortune,' . . . homeless[ness] is much more pervasive than personal failings." David Christiansen, *Legislative Homelessness*, L.A. TIMES, Dec. 30, 1991 (Metro), at 5.

137. Langdon & Kass, *supra* note 123, at 316-17.

138. See, e.g., BAXTER & HOPPER, *supra* note 122, at 52-55.

139. John H. Kennedy, *Is a Homeless Man's "Home" His Castle?*, THE BOSTON GLOBE, Jan. 13, 1991, at 29 (quoting Stewart Guernsey, executive director of Second Home, a provider of low-cost housing in Boston and Cambridge).

140. *Id.*

141. BAXTER & HOPPER, *supra* note 122, at 53.

142. See BAXTER & HOPPER, *supra* note 122, at 35. However, some studies have found that the homeless positively assess shelters. PETER H. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS 101 (1989). The studies asserted that those who consistently use the streets tended to fit one of the stereotypes of homeless as disreputable in appearance, incoherent, demoralized and depressed. *Id.* at 103-04.

143. Kennedy, *supra* note 139, at 29.

Another author noted the experience of a mother whose family was in a Salvation Army shelter: "[t]here was no door on the women's shower and one night I caught a man peeking into the women's bathroom watching my ten year old daughter. . . . Another time, a woman accused my daughter of trying to push her down the stairs. . . . The woman was mentally disturbed."<sup>144</sup> Not surprisingly, a study on the homeless stated in its findings that: "[i]t will be seen that in practice, one reason why so many homeless people prefer the streets to existing alternatives is the state of existing alternatives."<sup>145</sup>

The United States Supreme Court has refused to recognize a fundamental right to shelter for the homeless, stating, "[w]e do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality."<sup>146</sup>

### III. *Connecticut v. Mooney*

#### A. *The Facts*

The defendant, David Mooney, had been homeless for over one month.<sup>147</sup> He had first camped beside a fence near the Trumbull Street entrance to Interstate 91 in New Haven.<sup>148</sup> After two weeks, he left to search for a more private location when another homeless man began sleeping nearby.<sup>149</sup>

The defendant settled under a bridge abutment.<sup>150</sup> Although the land was owned by the State Department of Transportation, the defendant considered this area to be his "home."<sup>151</sup> The bridge abutment was underneath a highway pass

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144. JAMES D. WRIGHT, ADDRESS UNKNOWN: THE HOMELESS IN AMERICA 5 (1989).

145. BAXTER & HOPPER, *supra* note 122, at 7.

146. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (due process and equal protection challenge to state eviction statute).

147. *Connecticut v. Mooney*, 588 A.2d 145, 151, *cert. denied*, 112 S. Ct. 330 (1991). The defendant had previously lived in an apartment in New Haven, Connecticut. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Brief for Defendant-Appellant at 11, *Connecticut v. Mooney*, 588 A.2d 145 (1991) (No. 13737) [hereinafter Brief for Defendant-Appellant].

by the State Street entrance ramp to Interstate 91 in New Haven.<sup>152</sup> The abutment was secluded; it was separated from the ramp by a steep embankment of crushed stone and heavy underbrush.<sup>153</sup> During the month the defendant lived under the bridge, he was the sole occupant.<sup>154</sup> He left the area during the day and returned at night.<sup>155</sup> Concerned about theft, he secured his belongings so that they would not be seen from the bottom of the embankment.<sup>156</sup> The defendant was aware that anyone else could enter the property and, in fact, was once startled by a state highway worker clearing brush.<sup>157</sup> At night, the defendant slept behind a bush.<sup>158</sup>

The defendant owed money to Mark Allen for drugs.<sup>159</sup> On July 30, 1987, he and Allen went to an acquaintance's condominium on the pretext of a sexual tryst.<sup>160</sup> Once there, the defendant strangled the acquaintance, and he and Allen burglarized the residence.<sup>161</sup> Allen stole the victim's car and was picked up by the police on August 5, 1987.<sup>162</sup> After questioning Allen, the police secured an arrest warrant and arrested the defendant.<sup>163</sup> While the defendant was in custody, the police travelled to the defendant's "home" under the bridge to search for evidence connecting the defendant to the crimes.<sup>164</sup> No search warrant was

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152. Brief for Defendant-Appellant, *supra* note 151, at 3.

153. *Id.* ("This area was not readily visible or accessible.").

154. *Id.* at 9.

155. *Mooney*, 588 A.2d at 151.

156. Brief for Defendant-Appellant, *supra* note 151, at 3-4. In the suppression hearing, the defendant-appellant explained, "I always checked [the area under the bridge] because I was worried that . . . somebody might steal them, so I always made sure when you looked up there you couldn't see [my items]." *Id.* at 8A.

157. *Mooney*, 588 A.2d at 151.

158. Brief for Respondent in Opposition to Petition For Writ of Certiorari, *Connecticut v. Mooney*, 218 Conn. 80, 588 A.2d 145 (No. 90-1887), *cert. denied*, 112 S. Ct. 330 (1991) at 6 (brief submitted to the United States Supreme Court) [hereinafter Brief for Respondent].

159. Mark Allen was arrested and convicted in *Connecticut v. Allen*, 579 A.2d 1066 (1990).

160. *Mooney*, 588 A.2d at 149.

161. *Id.*

162. *Id.* at 150.

163. Brief for Defendant-Appellant, *supra* note 151, at 2-3.

164. *Id.* at 3-4. The police contacted Linda Spencer, the defendant's girlfriend, who led the police to the area under the bridge. *Id.*

issued.<sup>165</sup> On the ground under the bridge, the police found a blanket used as a mattress, a small closed duffle bag, and paper trash.<sup>166</sup> The defendant's belongings were "either rolled or packaged closed" and were "stored, . . . not strewn about at all."<sup>167</sup> The defendant had placed a rolled-up sleeping bag, a cardboard box, and a suitcase on the cement and metal beams of the highway support structure, using them as shelves.<sup>168</sup> Opening the duffle bag, the police found a large quantity of coins.<sup>169</sup> They then removed all of the items and brought them to the police station.<sup>170</sup> Again without a warrant, the police searched through the defendant's belongings.<sup>171</sup> The cardboard box contained a size thirty-eight belt.<sup>172</sup> The duffle bag also housed a pair of bloodstained pants and several pieces of jewelry.<sup>173</sup>

The belt and bloodstained pants obtained from the warrantless searches were used at trial to connect the defendant to the crime.<sup>174</sup> The trial court determined that the defendant had exhibited a subjective expectation of privacy in the items, stating, "[t]here's no doubt . . . he intended that his property not be searched and seized. He did make an effort to secrete these items or hide them . . . . Certainly . . . his subjective intent was not to have anyone seize those items."<sup>175</sup> However, because the belongings were located under the bridge, the defendant's subjective expectation of privacy in them was held unreasonable.<sup>176</sup> Consequently, a warrantless "search" as prohibited by the Fourth Amendment had not occurred.<sup>177</sup>

The defendant was subsequently convicted of felony murder

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165. *Id.* at 4.

166. *Mooney*, 588 A.2d at 150.

167. *Id.* at 151 n.7 (quoting testimony of the detective who went to the area under the bridge).

168. *Id.* at 150.

169. *Id.* The bag was later determined to hold \$700 worth of coins. *Id.* at 151.

170. *Id.* at 150-51. The court noted that the search did not fall under the inventory exception to the warrant requirement. *Id.* at 151 n.6.

171. *Id.* at 151.

172. *Id.* at 151-52.

173. *Id.*

174. *Id.* at 151.

175. Brief for Defendant-Appellant, *supra* note 151, at 8.

176. *Mooney*, 588 A.2d at 151.

177. Brief for Defendant-Appellant, *supra* note 151, at 9.

and robbery in the first degree.<sup>178</sup> The issue presented for appeal to the Supreme Court of Connecticut was whether the defendant had a reasonable expectation of privacy, protected by the Fourth Amendment, in his "home" under the bridge abutment and in the closed duffle bag and cardboard box located under the bridge abutment.<sup>179</sup>

## B. *The Majority Opinion*

### 1. *The Majority's Assessment of the "Home" Issue*

The majority<sup>180</sup> "divorced" the defendant's two claims of privacy as to his "home" and his belongings located within the duffle bag and cardboard box.<sup>181</sup> The first claim, that the police had invaded the defendant's "home" under the bridge abutment in which the defendant had an expectation of privacy, was not decided by the court.<sup>182</sup> According to the majority, this "broad" claim rested "solely on [the defendant's] homelessness."<sup>183</sup> In declining to analyze the issue, the court assumed "for purposes of this decision that the state is correct that the defendant's broad claim of fourth amendment protection in the area [under the bridge] must fail."<sup>184</sup>

### 2. *The Majority's Assessment of the "Closed Container Issue"*

The second claim, that the police had invaded the defendant's expectation of privacy in the contents of his duffle bag and card box, was decided in favor of the defendant.<sup>185</sup> The majority asserted that this claim rested upon more than just the defendant's homelessness: "[t]hat is but one factor among several, the principal ones being the nature of the containers searched and

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178. *Mooney*, 588 A.2d at 149.

179. Brief for Defendant-Appellant, *supra* note 151, at 6, 12.

180. The court sat *en banc*.

181. *Mooney*, 588 A.2d at 152.

182. *Id.* at 155.

183. *Id.* at 152.

184. *Id.*

185. *Id.* at 161 ("In sum, the defendant retained his reasonable expectation of privacy in the contents of his duffle bag and cardboard box.").

the circumstances surrounding their search.”<sup>186</sup> The majority focused on the contents of the closed containers as the “place” invaded:

although the United States Supreme Court has not specifically articulated the principle as such, the fourth amendment focus on the place invaded, when applied to luggage or other appropriate containers, refers to their interior or contents. Thus, although the inquiry in determining whether there is a reasonable expectation of privacy involves an inquiry into the particular place invaded, when the search is of a piece of luggage the principal “place” for fourth amendment purposes is the interior of the luggage and its contents.<sup>187</sup>

Thus, an expectation of privacy inheres in the contents of the container, not the visible exterior or location.<sup>188</sup> The majority noted the defendant’s consideration of the area under the bridge as his “home,” the seclusion of the area, and the “rough-hewn fashion” by which the defendant maintained the area as a home as factors important in the determination of his expectation of privacy in the closed containers.<sup>189</sup> However, the court carefully articulated that it was not deciding “whether the fourth amendment protects the goods and effects of *all* homeless persons, regardless of their particular circumstances.”<sup>190</sup>

a. *Closed Container Cases*<sup>191</sup>

The majority analyzed case law concerning “closed containers”<sup>192</sup> and found it to “strongly suggest [that] . . . the weighty interest in the expectation of privacy in the contents of luggage [or closed containers housing personal belongings] may be recognized by society under the facts of this case.”<sup>193</sup> However, the

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186. *Id.* at 154.

187. *Id.* at 157.

188. *Id.* at 156.

189. *Id.* at 155 n.12.

190. *Id.* at 155 (emphasis added).

191. *See supra* Part II.C.1.

192. *See, e.g., Robbins v. California*, 453 U.S. 420, (1981), *supra* note 69 and accompanying text.

193. *Mooney*, 588 A.2d at 158. The majority recognized that “[t]raditionally, great deference has been afforded under the fourth amendment to the expectation of privacy in luggage or closed containers.” *Id.* at 156.

majority concluded that closed container case law was not determinative of the issue under the "unique factual circumstances" of *Mooney*.<sup>194</sup> The factual circumstances were that the closed containers were found by the police in a secluded area that they knew the defendant considered "home," that the defendant's absence from his "home" during the search was due to his arrest, and that the purpose of the search was to obtain evidence of the crime for which the defendant was in custody.<sup>195</sup> In previous closed container cases, the owner of the container had been present at time of seizure and search of the containers,<sup>196</sup> had entrusted the containers to another for safekeeping,<sup>197</sup> or had left the containers in an area where the owner had a reasonable expectation of privacy.<sup>198</sup> Therefore, the majority concluded that the closed container cases did not compel a conclusion that the defendant's expectation of privacy was reasonable.<sup>199</sup>

b. *The Abandonment and Open Field Cases*

The majority found that abandonment cases<sup>200</sup> supported the state's assertion that the defendant had no Fourth Amendment interest in the closed containers.<sup>201</sup> The state asserted that the defendant had abandoned any expectation of privacy in his belongings when he left them there unattended and that he "could not reasonably expect that his possessions would remain shielded from the curiosity of passersby or from the scrutiny of the police."<sup>202</sup> Although the majority ultimately disagreed with

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194. *Id.* at 158. The majority stated that, "[a] close reading of those cases indicates that they do not resolve the issues in this case." *Id.*

195. *Id.* at 155. The majority stated that they believed "society would factor [the defendant's] absence into its calculus of whether the defendant's expectation of privacy was reasonable under all the circumstances of the case." *Id.* at 161 n.17.

196. *See, e.g.,* *United States v. Chadwick*, 433 U.S. 1 (1981), *supra* note 66.

197. *See, e.g.,* *United States v. Jacobson*, 466 U.S. 109 (1984), *supra* note 64 and accompanying text.

198. *Mooney*, 588 A.2d at 158 (citing *State v. Edwards*, 214 Conn. 57 (1990) (backpack located in apartment)). The majority noted that the location of the containers (under the bridge abutment) was relevant for Fourth Amendment inquiry into the expectation of privacy in the duffel bag and cardboard box. *Id.* at 157 n.14.

199. *Id.* at 158. *See supra* Part II.C.1.

200. *See supra* Part II.C.2.

201. *Mooney*, 588 A.2d at 154.

202. *Id.* The defendant had admitted that he knew the area was state property and that there was no reason why anyone else could not enter or live there. *Id.* at 151.

the state, the justices acknowledged the validity of some of the state's arguments. Turning to *Katz v. United States*,<sup>203</sup> the majority acknowledged that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>204</sup> The majority also agreed that trespassers ordinarily have no reasonable expectation of privacy in the place in which they are trespassing<sup>205</sup> and that leaving one's property in an area accessible to the public may affect the reasonableness of an expectation of privacy in that property.<sup>206</sup> However, the majority found these factors to be "relevant [only] as helpful guides."<sup>207</sup> It emphasized that such guides were "not [to] be undertaken mechanistically."<sup>208</sup> The majority further determined that the factors "are not ends in themselves; they merely aid in evaluating the ultimate question in all Fourth Amendment cases — whether the defendant had a legitimate expectation of privacy, in the eyes of our society, in the area searched."<sup>209</sup>

The majority also emphasized that the test for abandonment under the Fourth Amendment is distinct from that of property law.<sup>210</sup> Thus, a person could retain a property interest in an item while relinquishing a reasonable expectation of privacy in it.<sup>211</sup> According to the court, "[t]he test is whether, under all the facts, the owner or possessor may fairly be deemed as a matter of law to have relinquished his expectation of privacy in the object in question, and, where that object is a piece of luggage, in the contents thereof."<sup>212</sup> The majority concluded

203. 389 U.S. 347 (1967). See *supra* Part II.B.

204. *Mooney*, 588 A.2d at 153 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). By the same token, what an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351-52.

205. *Mooney*, 588 A.2d at 153-54. See *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986); *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976), *supra* Part II.C.3.

206. *Mooney*, 588 A.2d at 159-60. See *California v. Greenwood*, 486 U.S. 35 (1988), *supra* note 70 and accompanying text.

207. *Mooney*, 588 A.2d at 154.

208. *Id.*

209. *Id.* (quoting *Ruckman*, 806 F.2d at 1476 (McKay, J., dissenting)).

210. *Id.* at 158. See *supra* notes 89-92 and accompanying text.

211. *Id.*

212. *Id.* at 158-59. In reciting this test, the majority also determined that the trial

that the defendant in *Mooney* attempted to shield his possessions from view and did not manifest a intent to temporarily relinquish his expectation of privacy in the items.<sup>213</sup> Thus, the abandonment inquiry did not compel the majority to decide that the defendant had relinquished his expectation of privacy in the closed containers.<sup>214</sup>

The majority also concluded that the open fields doctrine, as enunciated in *Oliver v. United States*,<sup>215</sup> did not control the outcome of the case.<sup>216</sup> In *Oliver*, open fields were not afforded Fourth Amendment protection because they were not "effects" as enumerated in the Amendment and did not provide the setting for the intimate activities the Amendment was designed to protect.<sup>217</sup> In the present case, the closed containers clearly were "effects" within the meaning of the amendment.<sup>218</sup>

### 3. *The Majority's Return To "First Principles"*

The *Mooney* court returned to "first principles"<sup>219</sup> to decide the question of whether the defendant had a reasonable expecta-

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court had applied an incomplete test. *Id.* at 159. The trial court had decided that a reasonable person would have considered the defendant's property to have been abandoned. *Id.* This inquiry is relevant in determining reasonable expectation of privacy, but does not end the inquiry. *Id.*

213. *Id.* at 159-60.

214. *Id.* The abandonment cases were distinguished on three grounds: (1) none of them involved a search of the luggage of a homeless man where the police knew the area searched was his "home;" (2) none of them raised the independent privacy interest in the contents of the containers; and (3) most of them involved a defendant who exhibited a temporary intent to relinquish an expectation of privacy in the contents of the containers. *Id.* at 159-60. The majority referred to *California v. Greenwood*, 486 U.S. 35 (1988), in its discussion of abandonment, although the case was not decided on abandonment grounds. *Mooney*, 588 A.2d at 159. The case is distinguished because in *Greenwood*, the closed containers (garbage bags) were left at the curb for the express purpose of conveying them to a third party. *Id.* at 159.

215. 466 U.S. 170 (1984), *supra* note 78 and accompanying text.

216. *Mooney*, 588 A.2d at 159.

217. *Id.*

218. *Id.* at 160.

219. The majority stated: "[w]e return, therefore, to first principles in order to resolve the question . . . ." *Id.* See, e.g., *Oliver*, 466 U.S. at 178 (Powell, J., concurring) (citing *United States v. Chadwick*, 433 U.S. 1 (1977) ("[i]n assessing the degree to which a search infringes upon individual privacy, the Court has given weight to . . . the intention of the [F]ramers [sic] of the [F]ourth [A]mendment[,] . . . the uses to which the individual has put a location . . . and our societal understanding that certain areas deserve . . . protection from government invasion.")).

tion of privacy in the cardboard box and duffle bag.<sup>220</sup> In doing so, the majority considered societal values and customs, the location of the luggage under the bridge on public land, and the status of the defendant as a trespasser.<sup>221</sup> Consequently, the majority reached four conclusions: (1) the place searched was the interior of Mooney's closed duffle bag and cardboard box; (2) the containers were located in a place that the defendant regarded as his home and the police were aware of this when they searched it; (3) the defendant could not assert his Fourth Amendment rights regarding the containers because he was in custody; and (4) the purpose of the search was to gather evidence, not to safeguard the luggage or identify the owner.<sup>222</sup> These conclusions supported the majority's finding that the defendant's expectation of privacy in his duffle bag and cardboard box was reasonable.<sup>223</sup> Specifically, the court announced:

We believe that under these particular circumstances, society's code of values and its notions of custom and civility would cause it to recognize as reasonable the defendant's expectation of privacy in his duffle bag and cardboard box. The interior of those two items represented, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of customs and civility, and our codes of values, would include some measure of respect for that shred of privacy, and would recognize its assertion as reasonable under the circumstances of this case.<sup>224</sup>

### C. *The Dissent*

The dissent did not "divorce" the issues of the defendant's expectation of privacy in the area under the bridge and in the closed containers.<sup>225</sup> The dissent argued that "the defendant had

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220. *Mooney*, 588 A.2d at 160.

221. *Id.*

222. *Id.* at 160-61.

223. *Id.* at 161.

224. *Id.* The majority also buttressed its opinion with a balancing test, weighing society's interest in law enforcement against Mooney's expectation of privacy in his luggage. The majority concluded that the defendant's interest outweighed that of society. *Id.*

225. *Id.* at 172 ("Unlike the majority, I cannot divorce the analysis of the container issue . . .") (Callahan, J., dissenting).

no reasonable expectation of privacy in the area under the bridge . . . [and] . . . could not have reasonably expected that the contents of his containers would remain inviolate if left there unattended."<sup>226</sup> The dissent concluded that the defendant's expectation of privacy in the area under the bridge and the containers was unreasonable because a bridge abutment is a public place, readily accessible to anyone.<sup>227</sup>

The dissent applied what it termed a "realistic assessment" of the circumstances and likelihood that Mooney's privacy interest might have been invaded.<sup>228</sup> It referred to the majority's reliance on the defendant's privacy interest in the interior of the containers as "puzzling."<sup>229</sup> Instead, the dissent focused on the *location* of the containers under the bridge and the defendant's status as a trespasser on public land.<sup>230</sup> The dissent determined that the defendant need not indicate an intent to relinquish his expectation of privacy in the duffle bag and cardboard box for the possessions to be deemed "abandoned."<sup>231</sup>

Citing *California v. Greenwood*,<sup>232</sup> the dissent emphasized that the accessibility of the duffle bag and cardboard box to members of the public was the predominant factor in its Fourth Amendment analysis.<sup>233</sup> The defendant's status as homeless did not affect the dissent's determination that the defendant had no

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226. *Id.* at 172-73.

227. *Id.* at 171-72. According to the dissent: "[A] common thread that unifies the intricate and often confusing legal patchwork of fourth amendment case law [after *Katz v. United States*], . . . is that '[w]hat a person knowingly exposes to the public, even in his own home, is not a subject of Fourth Amendment protection.'" *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). The dissent also cited to *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986) (defendant who lived in a cave for eight months had no reasonable expectation of privacy) and *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) (squatters had no reasonable expectation of privacy). See *supra* Part II.C.3.

228. *Mooney*, 588 A.2d at 175 (Callahan, J., dissenting).

229. *Id.*

230. *Id.* at 172, 175.

231. *Id.* at 175. The dissent concluded that the defendants in the abandonment line of cases attempted to "hide" their possessions in public places, yet their expectations of privacy were held unreasonable. *Id.* See *United States v. Brown*, 473 F.2d 952, 954 (5th Cir. 1973); *United States v. Thomas*, 864 F.2d 843, 846-847 (D.C. Cir. 1989), *supra* Part II.C.2.

232. 486 U.S. 35 (1988), *supra* note 70 and accompanying text.

233. *Mooney*, 588 A.2d at 175 (Callahan, J., dissenting).

reasonable expectation of privacy in the closed containers.<sup>234</sup> The dissent believed that:

[t]he upshot of the majority's reliance on this fact . . . that the defendant was homeless and that the police knew that [he considered this area to be his home, is that] a homeless person who leaves his belongings in containers under an abutment receives greater protection . . . than would a person who had a home but placed articles there for other reasons.<sup>235</sup>

The dissent concluded by stating, "I believe that the majority has allowed the current publicity and concern for the plight of the homeless to create an empathy that in turn has created bad fourth amendment law."<sup>236</sup>

#### IV. Analysis

The majority in *Connecticut v. Mooney*<sup>237</sup> creatively "divorced" the issues of the defendant's right to privacy in the area under the bridge and his right to privacy in the duffle bag and cardboard box.<sup>238</sup> By divorcing the issues, the majority was able to distinguish *Mooney* from the two factually similar cases of *Amezquita v. Hernandez-Colon*<sup>239</sup> and *United States v. Ruckman*,<sup>240</sup> neither of which involved the search of a closed container within the "home."<sup>241</sup> The "place" focused on in

234. *Id.* at 173.

235. *Id.*

236. *Id.* at 176.

237. 588 A.2d 145, *cert. denied*, 112 S. Ct. 330 (1991).

238. *See id.* at 152. The language of the Fourth Amendment supports divorcing the issues, as "effects" are listed separately from "houses." *See supra* note 3 and accompanying text. The Supreme Court has traditionally afforded closed containers a high degree of protection because they are repositories of personal effects and justify a privacy interest. *See California v. Greenwood*, 486 U.S. 35 (1988); *United States v. Jacobsen*, 466 U.S. 109 (1984); *United States v. Chadwick*, 433 U.S. 1 (1977); *United States v. VanLeeuwen*, 397 U.S. 249 (1970) (reaffirming *Ex Parte Jackson*, 96 U.S. 727 (1878)). *See supra*, part II.C.1.

239. 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) (squatters built structures on land owned by Commonwealth of Puerto Rico and defied orders to leave). *See supra* notes 104-108 and accompanying text.

240. 806 F.2d 1471 (10th Cir. 1986) (defendant lived in a cave on federal land for eight months). *See supra* notes 109-116 and accompanying text.

241. In *Amezquita* and *Ruckman*, the circuit courts determined that the defendants' status as trespassers rendered their expectations of privacy in makeshift homes unreasonable. *Amezquita*, 518 F.2d at 12; *Ruckman*, 806 F.2d at 1473.

*Amezquita* and *Ruckman* was the makeshift home itself, rather than the interior of the closed containers as in *Mooney*.<sup>242</sup> The majority in *Mooney* focused on the interior of the defendant's duffle bag and cardboard box as the "place" invaded by the search in order to find that the defendant had a reasonable expectation of privacy in the contents of the duffle bag and cardboard box.<sup>243</sup> This place, the interior of the duffle bag and cardboard box, necessitated Fourth Amendment protection because it represented the defendant's "last shred of privacy from the prying eyes of outsiders."<sup>244</sup>

Thus, the majority in *Mooney* determined that society was prepared to recognize the defendant's expectation of privacy in the duffle bag and cardboard box as reasonable under the unique circumstances of the defendant's homelessness.<sup>245</sup> Prior precedent suggests that the duffle bag and cardboard box would have been determined abandoned if the majority had not considered the defendant's homelessness.<sup>246</sup> Since inquiry under the Fourth Amendment is fact-specific, an apparently small difference in the factual setting is often viewed as a controlling difference in determining Fourth Amendment rights.<sup>247</sup> In *Mooney*, the defendant's homelessness presented a significant factual difference

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242. *Amezquita*, 518 F.2d 8; *Ruckman*, 806 F.2d 1471.

243. *Mooney*, 588 A.2d at 157. The majority stated that the exterior, or location, of the containers was *not* the focus. *Id.* at 156. However, recent Supreme Court Fourth Amendment jurisprudence suggests the opposite; that the reasonableness of the privacy interest in closed containers is directly related to the place in which they were found. *See, e.g., California v. Acevedo*, 111 S. Ct. 1982 (1991) (allowing warrantless search of closed containers found in automobiles). In the *Mooney* situation, the place was public land and the defendant was a trespasser. *Mooney*, 580 A.2d at 160. Thus, the *Mooney* majority took a courageous step in divorcing the issues and holding that the duffle bag and cardboard box were protected by the Fourth Amendment. *Id.* at 145.

244. *Mooney*, 588 A.2d at 161.

245. *Id.* at 160-61.

246. *See United States v. Thomas*, 864 F.2d 843 (D.C. Cir. 1989) (gym bag dropped in hallway of apartment building considered abandoned); *United States v. Brown*, 473 F.2d 952 (5th Cir. 1973) (suitcase buried under chicken coop considered abandoned); *St. Paul v. Vaughn*, 237 N.W.2d 365 (Minn. 1975) (eyeglass case hidden under counter at dry-cleaners considered abandoned), *supra* Part II.C.2.

247. *Arkansas v. Sanders*, 442 U.S. 753, 757 (1979), *supra* note 66. Courts and law enforcement officers often have difficulty discerning the proper application of well-settled Fourth Amendment principles in individual cases because "the circumstances giving rise to suppression requests can vary almost infinitely." *Id. But cf. California v. Acevedo*, 111 S. Ct. 1982 (1991) (providing clarification of the rule pertaining to searches of closed containers in automobiles), *supra* note 66.

from other Fourth Amendment decisions which should affect the reasonableness of the defendant's expectation of privacy in his makeshift home. Homelessness, therefore, served as a pivotal factor in the majority's analysis of the duffle bag and cardboard box, despite the majority's insistence that homelessness is "but one factor among several."<sup>248</sup>

However, the majority did not specifically establish that the area under a bridge is a "home" necessitating the Fourth Amendment protection that traditional homes receive.<sup>249</sup> For a determination of this issue, the spirit of the Fourth Amendment must be considered.<sup>250</sup> The framers of the United States Constitution passed the Fourth Amendment to protect individuals' persons and property from governmental search.<sup>251</sup> The spirit of the Amendment was to protect the "sanctity of a man's home and privacies of life."<sup>252</sup> Historical origins and Supreme Court jurisprudence suggest that the Fourth Amendment protects people, not places.<sup>253</sup> The framers of the Constitution knew:

that only a part of the pain, pleasure and satisfactions of life are to be found in material things. *They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations.* They conferred, as against the Government, *the right to be let alone* — the most comprehensive of rights and the right most valued by civilized men.<sup>254</sup>

To maintain its spirit, the Fourth Amendment must grow with society; when interpreting the Amendment the courts should "effectuate [its] purposes — to lend [it] meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials."<sup>255</sup>

248. *Mooney*, 588 A.2d at 154. The principal factor was the nature of the containers searched (that they were a cardboard box and duffle bag containing personal belongings). The majority also focused on the circumstances surrounding the search (that this was a search for evidence of a crime when the defendant was already in custody). *Id.* at 155.

249. *Mooney*, 588 A.2d at 155.

250. See *supra* notes 15-24 and accompanying text.

251. See generally, POLYVIU, *supra* note 14, at 16 (discussing the background of the Fourth Amendment).

252. *Boyd v. United States*, 116 U.S. 616, 630 (1886). See *supra* Part II.A.

253. *Katz v. United States*, 389 U.S. 347, 353 (1967). See *supra* Part II.B.

254. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added).

255. *Oliver v. United States*, 466 U.S. 170, 187 (1984) (Marshall, J., dissenting).

Thus, liberty and privacy were at the core of the Amendment.<sup>256</sup> The inquiry into the nature of the protection that the Fourth Amendment affords the homeless in their makeshift homes should require reference to a "place" only as needed to determine the privacy and liberty interests at stake within the "place."<sup>257</sup> As the Supreme Court recently stated, "[t]he sanctity of the home is not to be disputed. But the home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in [it], but because of their *privacy* interests in the activities that take place within."<sup>258</sup> One homeless man explained that: "[t]he most important thing in every man's life is shelter. Once you have shelter, then you are able to get yourself together, then you are able to develop the idea of how you can get yourself out of the trouble you are in."<sup>259</sup>

The *Mooney* dissent's primary focus on the defendant as a trespasser on public property, as well as the emphasis on the possibility of another person discovering the defendant's "home" and possessions,<sup>260</sup> is contrary to the principle that the Fourth Amendment protects people, not places.<sup>261</sup> The reference to the home as a "place" in Fourth Amendment analysis does not implicate property law.<sup>262</sup> The Supreme Court has determined that principles of property law are distinct from Fourth Amendment analysis and not determinative of an expectation of privacy.<sup>263</sup> As Justice Harlan stated in *Katz v. United States*, "the point is not that the [place such as a] telephone booth is 'accessible to the public' at other times, but that it is a temporarily private

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256. See *Boyd*, 116 U.S. at 630. As the Supreme Court noted, "[i]t is not the breaking of . . . doors, and the rummaging of . . . drawers, that constitutes the essence of the offence; but [rather] the invasion of [the] indefeasible right of personal security, personal liberty and private property" that violates the Fourth Amendment. *Id.*

257. See, e.g., *Oliver*, 466 U.S. at 184 (open fields doctrine). See generally, Michael Campbell, *Comment: Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 194 (1986) (commenting that an interest in privacy should be defined as "an interest in being left alone" and therefore a search should be defined as "conduct that violates a social norm of privacy.").

258. Wilkins, *supra* note 22, at 1112 (quoting *Segura v. United States*, 468 U.S. 796, 810 (1984)(emphasis in original)).

259. BAXTER, *supra* note 122, at 48.

260. *Mooney*, 588 A.2d at 172-73 (Callahan, J., dissenting).

261. See *Katz v. United States*, 389 U.S. 347, 353, *supra* Part II.B.

262. *Id.*

263. *Id.*

place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable."<sup>264</sup> The mere possibility of another person discovering the defendant's home and possessions should not diminish the defendant's expectation of privacy in them, just as the possibility of a burglary in a traditional home does not defeat an expectation of privacy in that home.<sup>265</sup> As stated by the majority in *Mooney*, the defendant's status as a trespasser should not be the determinative factor in deciding whether his expectation of privacy in his possessions or home was reasonable.<sup>266</sup> If it were the determinative factor, the law of property would control Fourth Amendment analysis.

How should a court determine whether the defendant's expectation of privacy in his makeshift home and belongings was reasonable? Unlike the dissent's inquiry of whether a "reasonable" person would believe his belongings under a bridge were accessible to the public,<sup>267</sup> the inquiry should turn to societal values and norms; what society views as reasonable for a person in the defendant's circumstances.<sup>268</sup> The Fourth Amendment reflects a substantive right to personal security and freedom.<sup>269</sup> This right is measured by asking whether a person's expectation of privacy is one which society is prepared to accept as reasona-

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264. *Id.* at 361, (Harlan, J., concurring) (citations omitted). See also *Oliver v. United States*, 466 U.S. 170 (1984), where the court states that inquiry under the Fourth Amendment must look to "whether the government's intrusion infringes upon the personal and societal values" protected by the Amendment. *Id.* at 182-83. The inquiry is not "whether the individual chooses to conceal assertedly 'private' activity." *Id.*

265. See *Hendrick v. United States*, 922 F.2d 396 (7th Cir. 1991). In *Hendrick*, the court noted that, "[t]he willingness of members of the public to trespass upon private property in order to search through garbage cans cannot automatically defeat the fourth amendment expectation of privacy any more than a series of burglaries could eliminate any expectation of privacy in the home." *Id.* at 400.

266. *Mooney*, 588 A.2d at 154.

267. *Id.* at 172 (Callahan, J., dissenting).

268. See *California v. Greenwood*, 486 U.S. 35 (1988), which provides support for an inquiry into societal norms. Under such norms, the majority in *Greenwood* determined that "it is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 40 (footnotes omitted). The dissent in *Greenwood* also focused on societal understandings, but reached a different conclusion, stating: "[s]crutiny of another's trash is contrary to commonly accepted notions of civilized behavior." *Id.* at 45 (Brennan, J., dissenting).

269. See *supra* notes 1-5 and accompanying text.

ble.<sup>270</sup> Privacy is:

a product of life in a human community, made possible through the operation of socialization and social controls. The quantity and quality of seclusion available to an individual or group are socially and culturally determined, and in that sense society and culture may be said to dictate what sorts of privacy one may reasonably expect . . . .<sup>271</sup>

Thus, to be reasonable, expectations of privacy must have a source outside the Fourth Amendment, such as societal norms.<sup>272</sup> These norms reflect "a set of necessary compromises that define the limits of individual freedom and privacy."<sup>273</sup>

Societal understandings of privacy and life in a human community are often mirrored in legislation and public policy, although not perfectly.<sup>274</sup> The statutory attention paid to the homeless by the states and the federal government recognizes homelessness as a societal problem.<sup>275</sup> Unfortunately, the legislative mirror does not provide a perfect reflection of social norms and understandings of the homelessness problem.<sup>276</sup> For example, some legislation indicates a frustration with the homelessness crisis, attacking the homeless themselves instead of the *causes* of homelessness.<sup>277</sup> Thus, one cannot only rely upon legislation to determine the societal norms concerning homelessness.

The inquiry into societal norms implicitly involves a value judgment concerning what actions are, or are not, accepted in a

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270. See, e.g., *Katz v. United States*, 389 U.S. 347, 361 (1967).

271. *LaFAVE*, *supra* note 15, at 312.

272. *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978) (expectations of privacy either founded in property law or societal norms).

273. *Campbell*, *supra* note 256, at 208.

274. *Id.* at 208 n.92.

275. See Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 485(a) (1987) (codified at 42 U.S.C.A. § 11302(a) (West Supp. 1992)), *supra* notes 126-29 and accompanying text.

276. See *Campbell*, *supra* note 256, at 208 n.92.

277. Dunstan McNichol, *Laws Attack Homeless, Group Says*, STATES NEWS SERVICE, Dec. 17, 1991. Anti-homeless legislation can be found in many counties. This legislation usually prohibits such activities as sleeping on sidewalks or public property. By punishing a person "for not having an adequate place to sleep," the legislation "is equivalent to punishing that individual for *being* homeless." Donald E. Baker, Comment, "Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. MIAMI L.R. 417, 441-42 (1990-91) (emphasis in original).

civilized society.<sup>278</sup> For many of our nation's homeless population like Mooney, the area under a bridge abutment is considered a "home."<sup>279</sup> Although not a traditional home, this "home base" is the place where the individual "performs the usual functions of sleeping, eating, and living . . . and a place to which one . . . always intends to return."<sup>280</sup> Since the homeless are a part of society, *their notions* of privacy should also enter into the "reasonable expectation of privacy" equation. Too quickly the homeless are ignored because the homeless make many people uncomfortable. As one commentator noted, "they 'evoke our pity and a tangle of other disquieting emotions: anger, frustration, fear, and a lingering malaise' that the American dream may be starting to fade away."<sup>281</sup> The same commentator also described the public's view of the homeless in a more graphic manner: "[F]or many of us, the homeless are shit, and our policies toward them, our spontaneous sense of disgust and horror, our wish to be rid of them - all of this has hidden in it, close to its heart, our feelings about excrement."<sup>282</sup> However, it is important to remember that the homeless' notions of privacy and liberty are the same as the non-homeless public's.<sup>283</sup> Indeed, this is the reason why the homeless are often offended by conditions in

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278. See, e.g., *Greenwood*, 486 U.S. at 45-46 (Brennan, J., dissenting), *supra* note 265. See generally, Campbell, *supra* note 256, at 207-08. One commentator notes that: "social norms of privacy are not a detailed and idealized code of etiquette. Of necessity, norms of privacy must be general principles to which nearly all members of society subscribe." *Id.* at 208.

279. A New York Court has acknowledged these homes in the context of voting rights. The Southern District of New York decided that the stringent "domicile" standard under New York's election law was satisfied if a homeless person could identify a "home base" to which he/she regularly returned. *Pitts v. Black*, 608 F. Supp. 696, 710 (S.D.N.Y. 1984). Thus, a non-traditional residence was not reasonable ground for denying a homeless person the right to vote. Similarly, a non-traditional residence should not be a reasonable ground for denying a homeless person Fourth Amendment protection.

280. *Pitts*, 608 F. Supp. at 698.

281. BARAK, *supra* note 118, at 11 (quoting MARJORIE HOPE & JAMES YOUNG, *THE FACES OF HOMELESSNESS* 28 (1986)).

282. *Id.* at 11-12 (quoting Peter Marin, *Helping and Hating the Homeless: The Struggle at the Margins of America*, HARPER'S MAGAZINE, Jan. 1987, at 47).

283. Society must not allow its frustration over the apparent intractability of the homeless problem to undermine our societal values, such as the right to privacy. See generally Marsha Mercer, A "Compassion Fatigued" Nation Hardens its Heart to the Homeless, CHICAGO TRIBUNE, Dec. 26, 1991, at 27 (reporting on backlash of anti-homeless attitudes as the number of homeless has increased in the nation's cities).

shelters and why shelters are often a last-ditch alternative.<sup>284</sup>

The defendant in *Mooney* settled for a bridge abutment which provided more, not less, privacy for him and his belongings than a shelter.<sup>285</sup> Realistically, since the defendant had nowhere else to safeguard his belongings, it is clear that he did not abandon his privacy interest in them in the same manner as one who has a house but "stashes" his belongings temporarily under a bridge for a day. The defendant created a "zone of privacy"<sup>286</sup> by hiding his possessions within the duffle bag and cardboard box which contained his belongings.<sup>287</sup> The majority recognized and respected this zone of privacy by affording it Fourth Amendment protection.<sup>288</sup>

However, the defendant also created a zone of privacy in the area under the bridge by hiding his belongings under the girders and returning to it every night.<sup>289</sup> This zone of privacy was not recognized by the majority.<sup>290</sup> The area under the bridge is conceptually linked with intimacy and personal privacy, both of which are protected by the Fourth Amendment.<sup>291</sup> Most of the public has viewed the various "homes" created by the homeless and would refrain from venturing into one in recognition of its status as a "home." Most of the public would respect a homeless individual's privacy because of the social understanding of the privacy associated with homes.

By refusing to recognize an expectation of privacy in the area under the bridge, however, the majority opinion failed to adequately reflect societal norms regarding the unique difficulties encountered by homeless persons trying to secure that "last shred of privacy from the prying eyes of outsiders . . . ."<sup>292</sup> Thus, if an individual has created a home for himself in order to ob-

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284. See *supra* notes 137-45 and accompanying text.

285. While in jail, Mr. Mooney expressed his feelings about the area under the bridge to a reporter: "I didn't feel homeless . . . . I felt at home." David Margolick, *Poverty and Privacy: Home, Sweet Niche?*, N.Y. TIMES, Nov. 17, 1990 at 25 (Late Edition).

286. See Wilkins, *supra* note 22, at 1112.

287. See Brief of Defendant-Appellant, *supra* note 151, at 3-4.

288. Connecticut v. Mooney, 588 A.2d 145, 161 (1991).

289. *Id.* at 150-51.

290. *Id.* at 152.

291. See Wilkins, *supra* note 22, at 1112; see also *supra* Part II.D.

292. *Mooney*, 588 A.2d at 161.

tain some privacy and secure belongings, and the area is clearly recognizable by a reasonable person as a home conveying an expectation of privacy,<sup>293</sup> the individual has created a "zone of privacy" into which the police should not intrude without a warrant.<sup>294</sup> Only in this way will the spirit of the Fourth Amendment be realized, "for . . . the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion . . . ."<sup>295</sup>

## V. Conclusion

The expansive protection of the constitutional values of liberty and privacy under the Fourth Amendment,<sup>296</sup> established in *Katz v. United States*,<sup>297</sup> is being denied to a significant segment of the American population, the homeless. The Fourth Amendment protects these values when a person has a tradi-

293. The home must be recognizable as a "home" so that the law enforcement officials are able to determine where they can and cannot enter without a warrant.

294. This recognition of the privacy associated with a makeshift home does not imply an acceptance of homelessness as an incurable situation. The advocacy to end homelessness must continue; no one deserves to be without a home.

A recent United States District Court decision addressed the constitutional rights of the homeless. In *Pottinger, et. al. v. Miami*, No. 88-2406, 1992 U.S. Dist. LEXIS 17640 (S.D. Fla. Nov. 16, 1992), the court noted that Miami's practice of arresting the homeless for engaging in basic activities of daily life, including sleeping and eating in public, and seizing the personal property of the homeless violated various constitutional protections, including the Fourth Amendment. *Id.* at \*106-07. The court emphasized that, "except for a fortunate few, most homeless individuals have no alternative to living in public areas." *Id.* at \*18.

The court also found that the homeless "exhibited a subjective expectation of privacy in their belongings," and concluded that society was prepared to recognize the expectations as reasonable. *Id.* at \*62, \*64-68 (discussing *Connecticut v. Mooney*, 588 A.2d 145, *cert. denied*, 112 S. Ct. 330 (1991)). The court also noted that it had previously found that property belonging to the homeless was "reasonably identifiable by its appearance and its organization in a particular area, [and] . . . that homeless individuals often arrange their property in a manner which suggests ownership." *Id.* at \*64 (citing the court's March 18, 1991 order, which found the city of Miami in civil contempt of the court's earlier April 26, 1990 order). The court further determined that "[s]uch characteristics make the property of homeless persons reasonably distinguishable from truly abandoned property." *Id.* at \*63.

295. *United States v. Ross*, 456 U.S. 798, 822 (1982).

296. See *Oliver v. United States*, 466 U.S. 170, 186 (1984) (Marshall, J., dissenting) ("The Fourth Amendment . . . was designed . . . to identify a fundamental human liberty that should be shielded forever from government intrusion.").

297. 389 U.S. 347 (1967).

tional home.<sup>298</sup> Unfortunately, today's society consists of many persons *without* traditional homes. Thus, the Amendment should also protect the personal privacy interests of those citizens too unfortunate to afford traditional shelter.

The problems of the homeless, although a local concern, have national ramifications. The homeless population is growing, with no end in sight.<sup>299</sup> At some point, the United States Supreme Court will be forced to address the Fourth Amendment rights of the homeless. The Connecticut Supreme Court has taken the first step in acknowledging the Fourth Amendment right of a homeless individual in his possessions, when the possessions are within closed containers located in the area that the individual calls "home." This first step, however, is a very small one. Societal understandings of the privacy associated with a home must be translated into an expectation of privacy for the homeless individual in the place he considers his "home." As the majority in *Mooney* stated: "[to] conclude otherwise . . . would come dangerously close to bringing to fruition the famous ironic reference of Anatole France to 'the majestic equality of the laws which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread.'"<sup>300</sup>

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298. See U.S. CONST. amend. IV.

299. See *supra* notes 120-25 and accompanying text.

300. *Mooney*, 588 A.2d at 161 (quoting ANATOLE FRANCE, *THE RED LILY* 91 (Stephens trans. 1925)). The defendant was released from jail upon the majority's finding that the defendant's expectation of privacy in his duffle bag and cardboard box was reasonable. Mr. Mooney was found dead in a New Haven park on November 5th, 1992. Edmund Mahoney, *Man In Privacy Case For Homelss Dies*, HARTFORD COURANT, November 13, 1992 at C1 (discussing *Connecticut v. Mooney*).

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